

1 CURTIS R. TINGLEY (SBN 112322)  
ctingley@tingleyllp.com  
2 BRUCE C. PIONTKOWSKI (SBN 152202)  
bpiontkowski@tingleyllp.com  
3 JONATHAN A. McMAHON (SBN 239370)  
jmcmahon@tingleyllp.com  
4 TINGLEY PIONTKOWSKI LLP  
10 Almaden Boulevard, Suite 430  
5 San Jose, California 95113  
Telephone: (408) 283-7000  
6 Facsimile: (408) 283-7010

7 Attorneys for Defendants  
NICHOLAS L. CAPURRO and  
8 CAPURRO ENTERPRISES INCORPORATED

9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 SAN FRANCISCO DIVISION  
12

13 CERTA PROPAINTERS, LTD.,

14 Plaintiff,

15 v.

16 NICHOLAS L. CAPURRO, an individual, and  
17 CAPURRO ENTERPRISES INCORPORATED,  
a California Corporation,

18 Defendants.  
19  
20

CASE NO. CV10-1542 WHA

**DEFENDANTS' MEMORANDUM  
OF POINTS AND AUTHORITIES  
IN OPPOSITION TO PLAINTIFF'S  
MOTION TO COMPEL  
PRODUCTION OF DOCUMENTS  
AND RESPONSES TO  
INTERROGATORY NO. 5 AND 6**

**Date: June 1, 2011  
Time: 2:00 p.m.  
Courtroom 9, 19<sup>th</sup> Floor**

21 **I. INTRODUCTION**

22 Plaintiff CERTA PROPAINTERS, LTD ("Plaintiff" or "CertaPro") served overbroad,  
23 cumulative and duplicative Requests for Production. The requests also sought documents that  
24 were not relevant to the parties' claims or defenses. Nonetheless, Defendants did agree to  
25 produce certain relevant documents that are responsive to the requests. Defendants have  
26 substantially complied with their agreement. This motion, therefore, was not necessary and  
27 should be denied.

28 Plaintiff also served its First Set of Interrogatories. The interrogatories that are the subject

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of this motion (*i.e.*, Interrogatory Nos. 5 and 6), however, could not be answered by Defendants because they did not identify the names of the individuals or businesses about which these interrogatories sought additional information. Now that Plaintiff has identified these individuals and businesses by name, Defendants can and will supplement their responses. This motion, therefore, is moot and should be denied.

## II. STATEMENT OF FACTS

In its Complaint, Plaintiff alleges that Defendant Nicholas Capurro owned and operated a franchise of Plaintiff's CertaPro painting business. Now, Capurro is operating his own painting business, Defendant Majestic Painters. Plaintiff claims that in doing so, Capurro breached the purported Franchise Agreement between Capurro and Plaintiff and that Capurro and Majestic Painters have infringed Plaintiff's trademarks. Defendants deny these allegations.

Despite the numerous allegations in the Complaint, this is a rather simple and straightforward breach of contract case between a franchisor and a franchisee. Majestic Painters is a small painting business operated by Capurro and his fiancée, Amber Wakeman. This is not a complicated matter that requires extensive discovery. Nonetheless, Plaintiff served burdensome, overbroad, and overreaching discovery requests. Defendants responded to these requests, and agreed to produce certain documents and respond to certain interrogatories, once additional information was provided to them. To date, they have substantially complied with their agreement. This motion, therefore, was not necessary, is moot, and should be denied.

## III. ARGUMENT

### A. Plaintiff's Requests for Production Seek Information That Is Irrelevant, Unreasonably Cumulative And Duplicative, And Unduly Burdensome; Nonetheless, Defendants Have Agreed to and Have Produced Responsive Documents

Each party to litigation generally has the right to discover "any nonprivileged matter that is relevant to any party's claim or defense." (Fed. R. Civ. P. 26(b)(1).) Only "for good cause" will a court order discovery of information that is "relevant to the subject matter involved in the action." (*Id.*)

Rule 26(b)(1) was enacted "'to involve the court more actively in regulating the breadth of sweeping or contentious discovery.' In particular, the [Federal] rules limit the breadth of

1 discovery that can occur absent court approval. Under Rule 26(b)(1), for example, discovery  
 2 must now relate more directly to a ‘claim or defense’ than it did previously, and ‘if there is an  
 3 objection that discovery goes beyond material relevant to the parties’ claims or defenses, the court  
 4 would become involved.’” (Elvig v. Calvin Presbyterian Church 375 F.3d 951, 968 (9th Cir.  
 5 2004) (*citing* Adv. Comm. Notes to 2000 Amendment to FRCP 26(b)(1)).)

6 Plaintiff’s First Set of Requests for Production are overbroad and do not describe with  
 7 reasonable particularity the documents or categories of documents that they seek to discover.  
 8 (Fed. R. Civ. Proc. 34(b)(1)(A).) For example, Request No. 6 demands that Defendants identify  
 9 “all documents that relate to your operation of the Franchise Business in a diligent, efficient and  
 10 reputable manner since January 1, 2009, as required by . . . the Franchise Agreement.” It would  
 11 be impossible for Defendants to respond to this request, much less produce responsive  
 12 documents. Every single document of Defendants could arguably relate to the “diligent, efficient,  
 13 and reputable manner” in which Capurro operated his business.

14 Likewise, Request No. 20 requires Defendants to “identify all documents that identify the  
 15 suppliers and vendors used in connection with the operation of Majestic Painters.” Again, this  
 16 request is far too broad and does not describe with any sort of particularity the documents it seeks  
 17 to discover. Responding to this request would potentially require Defendants to produce every  
 18 single receipt for every purchase that they have made related to the painting business.  
 19 Furthermore, this request seeks information and documents that are in no way relevant to any of  
 20 the claims or defenses in this case. This is a simple breach of contract case in which Plaintiff  
 21 alleges that Defendants breached the Franchise Agreement between Plaintiff and Defendant  
 22 Capurro. There is nothing in the allegations contained in Plaintiff’s complaint that relates to  
 23 Majestic Painter’s suppliers. Request No. 20 seeks information that is simply not relevant.

24 Even a cursory review of the Requests for Production at issue reveals that they represent  
 25 the very sort of “sweeping discovery” that Rule 26(b)(1) was enacted to prevent.

26 Additionally, many of the Requests for Production seek documents that are already in  
 27 Plaintiff’s possession, custody and control. Specifically, Request No. 1 asks for documents that  
 28 relate to royalty fees paid by Capurro to Plaintiff. Thus, **Plaintiff already has this information.**

Request No. 2 asks for all documents that relate to Capurro having achieved the gross sales requirements purportedly established by the Franchise Agreement. Again, **Plaintiff already has this information**. The request seeks documents that relate to Capurro's sales while he was a franchisee of Plaintiff; These documents were already given to Plaintiff as a routine part of Capurro's former relationship with Plaintiff. Request Nos. 3, 4 and 5 suffer from the same flaw. Each of these requests seek documents that Plaintiff already has.

Rule 26(b)(2)(C) provides: "On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: (i) the discovery sought is **unreasonably cumulative or duplicative**, or **can be obtained from some source that is more convenient**, less burdensome, or less expensive . . . or; (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."

Plaintiff already has the information sought in Request Nos. 1-5. This discovery, therefore, is unreasonably duplicative and can obviously be obtained from another source (*i.e.*, Plaintiff's own records).

Despite the fact that Plaintiff's First Set of Requests for Production are overbroad, seek irrelevant information, are unreasonably duplicative, and seek documents that can be obtained from a more convenient source, Defendants nonetheless did agree to produce certain documents. To date, Defendants have substantially complied with this agreement. Specifically, Defendants agreed to produce:

1. Majestic Painters' accounting documents and Profit and Loss Statements (responsive to Request Nos. 1, 3, 22);
2. Documents regarding local advertisements (responsive to Request No. 4);
3. Documents related to the termination of the Franchise Agreement (responsive to Request No. 7);
4. Documents related to CertaPro's waiver of the covenants of the Franchise Agreement (responsive to Request No. 8);

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- 1           5.     Majestic Painters' corporate documents (responsive to Request No. 10);
- 2           6.     Majestic Painters' current Web site (responsive to Request No. 11);
- 3           7.     Documents related to the named individuals and businesses identified in the
- 4 Requests for Production as purportedly being customers, former customers, or leads Plaintiff
- 5 (responsive to Request Nos. 13, 14, 15);
- 6           8.     Majestic Painters' original Web site (responsive to Request No. 16);
- 7           9.     Documents related to Majestic Painters' use of telephone and facsimile numbers
- 8 and email addresses (responsive to Request No. 17);
- 9           10.    Documents regarding advertising or promotion on Yelp, Thumbtack, Service
- 10 Magic, Facebook, and advertisements (responsive to Request No. 18);
- 11           11.    Documents to identify Home Depot, Lowes, Sherwin Williams, Benjamin Moore,
- 12 Kelley Moore, Office Depot, Orchard Supply Hardware, and Office Max (responsive to Request
- 13 No. 20);
- 14           12.    A list of Majestic Painters' customers (responsive to Request No. 21); and
- 15           13.    Documents that support Defendants' affirmative defenses (responsive to Request
- 16 Nos. 23-30).

17           Defendants have substantially complied with their agreement to produce the items listed

18 immediately above. To the extent that Defendants have agreed to produce documents but have

19 not yet made such a production, the documents are forthcoming.

20           Specifically, Defendants have already produced the following documents:

- 21           1.     Capurro Enterprises Incorporated's commercial insurance policy for the period
- 22 June 19, 2009, to June 19, 2010 (Bates stamp Nos. DEF00001 to DEF00109) (responsive to
- 23 Request No. 10) (See McMahon Declaration ¶ 2);
- 24           2.     Majestic Painters' original Web site, dated August 10, 2010, (Bates stamp Nos.
- 25 DEF00110 to DEF00125) (responsive to Request Nos. 16, and 23-30) (See McMahon
- 26 Declaration ¶ 3);
- 27           3.     Nick Capurro's Majestic Painters' business card (Bates stamp Nos. DEF00126 to
- 28 DEF00127) (responsive to Request Nos. 17 (showing phone numbers used) and 23-30) (See

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1 McMahon Declaration ¶ 4);

2 4. Majestic Painters' Fictitious Business Name Statement, filed in January 2010  
3 (Bates stamp No. DEF00128) (responsive to Request No. 10) (See McMahon Declaration ¶ 5);

4 5. Defendants' Federal Tax Employer Identification Number, as of February 16,  
5 2006 (Bates stamp No. DEF00129) (responsive to Request No. 10) (See McMahon Declaration ¶  
6 ¶ 6);

7 6. Capurro Enterprises Incorporated's Fictitious Business Name Statement, filed on  
8 February 17, 2008 (Bates stamp No. DEF00130) (responsive to Request No. 10) (See McMahon  
9 Declaration ¶ 7);

10 7. Capurro Enterprises Incorporated's California Franchise Tax Board Address  
11 Verification Notice, dated March 1, 2006 (Bates stamp No. DEF00131) (responsive to Request  
12 No. 10) (See McMahon Declaration ¶ 8);

13 8. Capurro Enterprises Incorporated's Articles, filed February 8, 2006 (Bates stamp  
14 Nos. DEF00132 to DEF00133) (responsive to Request No. 10) (See McMahon Declaration ¶ 9);

15 9. Majestic Painters' Web site home page, as of April 23, 2010 (Bates stamp Nos.  
16 DEF00134 to DEF00135) (responsive to Request Nos. 11, 16, and 23-30) (See McMahon  
17 Declaration ¶ 10);

18 10. A Majestic Painters advertisement (Bates stamp No. DEF00136) (responsive to  
19 Request Nos. 4, 17, 18, and 23-30) (See McMahon Declaration ¶ 11);

20 11. Google search for "nick capurro", dated April 23, 2010, (Bates stamp Nos.  
21 DEF00137 to DEF00138) (responsive to Request Nos. 4, 11, 16, 17, 18, and 23-30) (See  
22 McMahon Declaration ¶ 12);

23 12. Livermore CertaPro Web page, dated April 23, 2010, (Bates stamp Nos.  
24 DEF00139 to DEF00140) (responsive to Request Nos. 4, 11, 16, 17, 18, and 23-30) (See  
25 McMahon Declaration ¶ 13);

26 13. Majestic Painters' Yelp page, dated April 23, 2010 (Bates stamp Nos. DEF00141  
27 to DEF00142) (responsive to Request Nos. 18 and 23-30) (See McMahon Declaration ¶ 14);

28 14. Google Maps results for "CertaPro Painters" near Livermore, California, dated

1 April 23, 2010 (Bates stamp Nos. DEF00143 to DEF00145) (responsive to Request Nos. 4, 11,  
2 16, 17, 18, and 23-30) (See McMahon Declaration ¶ 15);

3 15. Capurro Enterprises, Inc.'s liability insurance certificate for June 19, 2009, to July  
4 22, 2010 (Bates stamp No. DEF00146) (responsive to Request No. 10) (See McMahon  
5 Declaration ¶ 16);

6 16. Google search results for "capurro painter", dated April 23, 2010 (Bates stamp  
7 Nos. DEF00147 to DEF00148) (responsive to Request Nos. 4, 11, 16, 17, 18, and 23-30 ) (See  
8 McMahon Declaration ¶ 17);

9 17. 123People search results for "Nick Capurro", dated April 23, 2010 (Bates stamp  
10 Nos. DEF00149 to DEF00150) (responsive to Request Nos. 4, 11, 16, 17, 18, and 23-30) (See  
11 McMahon Declaration ¶ 18);

12 18. Nick Capurro's CertaPro Painters business card (Bates stamp Nos. DEF00151 to  
13 DEF00152) (responsive to Request Nos. 17 (showing phone numbers used) and 23-30) (See  
14 McMahon Declaration ¶ 19);

15 19. Amber Wakeman's CertaPro Painters' business card (Bates stamp Nos. DEF00153  
16 to DEF00154) (responsive to Request No. 17 (showing phone numbers used) and 23-30) (See  
17 McMahon Declaration ¶ 20);

18 20. CertaPro Painters' Certainty Service System catalog (Bates stamp Nos. DEF00155  
19 to DEF00166) (responsive to Request Nos. 23-30) (See McMahon Declaration ¶ 21);

20 21. CertaPro Painters' Exterior Color Combinations catalog (Bates stamp Nos.  
21 DEF00167 to DEF00174) (responsive to Request Nos. 23-30) (See McMahon Declaration ¶ 22);

22 22. CertaPro Painters' advertisement brochure (Bates stamp Nos. DEF00175 to  
23 DEF00176) (responsive to Request Nos. 4, 23-30) (See McMahon Declaration ¶ 23);

24 23. Majestic Painters' current Web site (Bates stamp Nos. DEF00177 to DEF00182)  
25 (responsive to Request Nos. 11, 23-30) (See McMahon Declaration ¶ 24);

26 24. Majestic Painters' current Facebook page (Bates stamp Nos. DEF00183 to  
27 DEF00184) (responsive to Request Nos. 18, 23-30) (See McMahon Declaration ¶ 25);

28 25. Majestic Painters' current thumbtack.com page (Bates stamp Nos. DEF00185 to

1 DEF00186) (responsive to Request Nos. 18, 23-30) (See McMahon Declaration ¶ 26);

2 26. Amber Capurro's Majestic Painters' business card (Bates stamp Nos. DEF00187  
3 to DEF00188) (responsive to Request No. 17 (showing phone numbers used) and 23-30) (See  
4 McMahon Declaration ¶ 27); and

5 27. Current Google search results for "majestic painters" (Bates stamp Nos.  
6 DEF00189 to DEF00190) (responsive to Request Nos. 4, 11, 16, 17, 18, and 23-30) (See  
7 McMahon Declaration ¶ 28).

8 Defendants, therefore, have substantially complied with their agreement to produce  
9 certain documents in response to the Requests for Production. To the extent that certain  
10 documents have not yet been produced (*e.g.*, Defendants' profit and loss statements), they are  
11 forthcoming. Majestic Painters is a two-person operation and does not have a sophisticated  
12 records retention system. Defendants are diligently working to produce those documents that  
13 they originally agreed to produce. Nonetheless, most of such documents have already been  
14 produced.

15 This motion, therefore, is moot and should be denied.

16 **B. Defendants Will Supplement Their Responses to Interrogatory Nos. 5 and 6**

17 Interrogatory No. 5 asks Defendants to "IDENTIFY all CertaPro LEADs and  
18 ESTIMATES that were converted into Majestic customers." Similarly, Interrogatory No. 6 asks  
19 Defendants to "IDENTIFY all CertaPro LEADs and ESTIMATES entered into CertaPro's  
20 proprietary software "Certa Notes" as a "DEAD LEAD" or "DEAD ESTIMATE" and the reason  
21 for such categorization.

22 Defendants objected to these interrogatories and stated that "Responding Party is unable  
23 to answer this interrogatory because Responding Party is not aware of CettaPro's LEADs and  
24 ESTIMATES. Responding Party is not longer affiliated with CertaPro and does not have access  
25 to its list of LEADs or ESTIMATES." **This is a completely valid objection.** Defendant Capurro  
26 no longer has access to Plaintiff's "Certa Notes" database and, therefore, has no way of knowing  
27 who was a CertaPro LEAD or ESTIMATE. There was simply no way Defendants could respond  
28 to this interrogatory; **They do not have access to the information that is necessary to form a**

1 response.

2 Nonetheless, now that Plaintiff has identified in its Requests for Production the names of  
3 those individuals and business that it apparently considers to be the relevant LEADS and  
4 ESTIMATES, Defendants will supplement their responses to Interrogatory Nos. 5 and 6. A  
5 complete response to these interrogatories could have been given long ago if Plaintiff had only  
6 identified these individuals and businesses when it first served the Interrogatories. Defendants  
7 cannot be required to guess the subject matter of an interrogatory.

8 Now that Plaintiff has identified by name the individuals and businesses that are relevant  
9 to Interrogatory Nos. 5 and 6, Defendants will supplement their responses to these interrogatories.  
10 This motion, therefore, is unnecessary and moot and should be denied.

#### 11 IV. CONCLUSION

12 Defendants have substantially complied with their agreement to produce documents that  
13 are responsive to certain Requests for Production. To the extent that promised documents have  
14 not yet been produced, they are forthcoming. Furthermore, now that Plaintiff has supplied the  
15 information necessary for Defendants to draft a response to Interrogatory Nos. 5 and 6,  
16 Defendants will supplement their responses to these interrogatories.

17 This motion, therefore, is moot. It should be denied.

18 Dated: May 27, 2011

TINGLEY PIONTKOWSKI LLP

19  
20 By: 

21 BRUCE C. PIONTKOWSKI  
22 JONATHAN A. MCMAHON  
23 Attorneys for Defendants  
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